



The cost of a hollow victory

CAB evidence on enforcement of employment tribunal awards

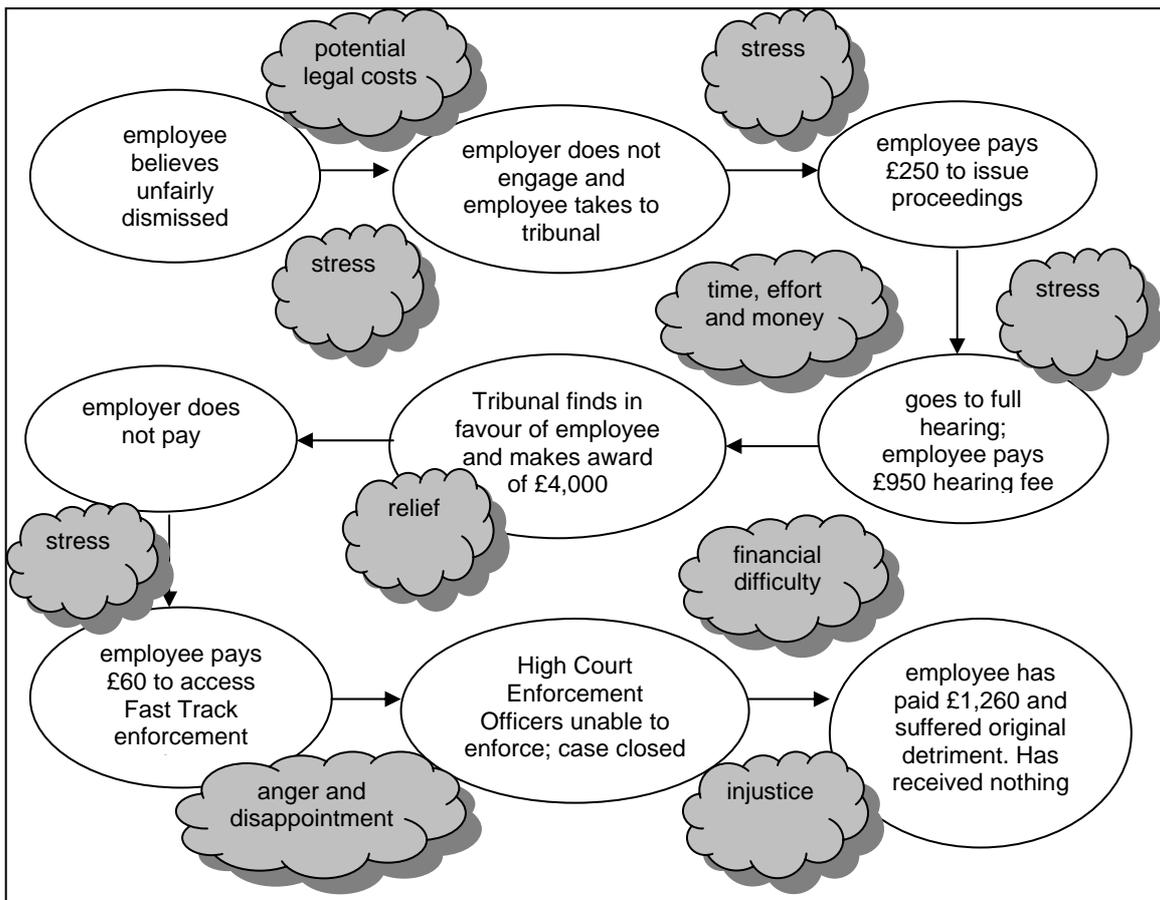
November 2013

Summary

What is the problem?

1.1 Getting people into work is undoubtedly a key aspiration of this Government. Getting into meaningful and profitable employment and staying there is also a key aspiration of the majority of working age people. But for too many people the promise of profitable work is thwarted by rogue or negligent employers – unpaid wages; dismissal with no reason or notice; discrimination.

1.2 British workers have protections against such practices – but protections are effective only insofar as they are properly enforced. The prospect of taking a claim to an employment tribunal to enforce an employment right is daunting enough in itself. But having found the resource, both personal and financial, to do so and obtaining a judgment and award in your favour, you could be forgiven for thinking it is a battle won. Think again. Approximately half of the people to whom an employment tribunal makes a financial award will not be paid without them having to expend more effort and money on enforcement. And even then, payment is far from guaranteed.



Why is this important now?

1.3 This situation was unacceptable when employment tribunals were free to access. Since July 2013 however, it has cost large amounts in fees to take a claim to tribunal. Claimants are effectively being asked to gamble their money on a system with very poor odds, in order to try and obtain their rights. This is indefensible and places under threat the credibility of the Employment Tribunal, and the credibility of an asserted commitment to ensure that employees are properly protected in their working life.¹

1.4 The individual loss to claimants for whom the service fails to deliver is unjust. But it is not the only consideration. The Government is working hard to encourage people into the workplace and off benefits. A flourishing employment market is vital to the health and growth of the economy. But if employers are able to ignore their responsibilities, to not pay their staff, to dismiss without appropriate notice or recompense, to discriminate or treat them unfairly, then the whole infrastructure suffers. Responsible employers find themselves undercut and disadvantaged. Employees find themselves disillusioned and in financial difficulty.

1.5 A precarious labour market presents the ideal opportunity for exploitation. If someone feels unfairly treated, they know there will be others waiting for their job, and that claiming benefits unless they can prove constructive dismissal will be impossible. Feeling trapped, they are likely to take the hit on unpaid wages or holiday pay, increasing financial strain on them and their families and destabilising the labour market as a whole as employers find they can get away easily with such practices. Robust enforcement of employment protections, at the heart of which is effective enforcement of employment tribunal decisions, is vital to ensure that employers cannot just ride roughshod over the duties they have to their workforce, and gain unfair advantage over their competitors at the same time.

What needs to happen?

1.6 In its first usage of the 'naming and shaming' scheme introduced to aid enforcement of the National Minimum Wage, the then Employment Relations Minister, Norman Lamb commented 'There is no excuse for not paying the NMW in the first place but failing to pay on being required to do so by investigators from HM Revenue & Customs is unacceptable.'² We entirely agree, but this must be equally as valid for failure to comply with requirements that have been stipulated by a judicial tribunal. We cannot continue with a system which takes so little interest in whether or not the decisions it makes in relation to an employer's responsibilities are complied with, and instead leaves the individual struggling alone to negotiate complicated enforcement processes and having to decide whether to risk more money which they may never recover to enforce their rights.

¹ Earlier this year, the Employment Relations Minister, Jo Swinson, stated 'Our efforts to review areas of employment law, not just tribunals, are about making sure business can get on and grow, while employees have the necessary protections in place.' - Department for Business, Innovation and Skills press release 'Government to simplify and improve employment tribunals' – 14 March 2013

² BIS Press Release: 'Lamb names employer for flouting the National Minimum Wage' – 4 September 2012

The preferred option

- government plays a proactive role in enforcing employment tribunal awards. Her Majesty's Revenue and Customs has enforcement officers both for the National Minimum Wage and to collect tax debt. Their responsibilities could be widened to cover enforcement of employment tribunal awards. HMRC are not only likely to hold information on a company's tax position which could assist in establishing viable assets, but may also be chasing the same company for tax debts, so could add the unpaid award to this recovery.

The second option

- improve access to, and efficiency of, current Acas and Employment Tribunal Fast Track enforcement scheme. The £60 enforcement fee should be abolished given that claimants will already have paid hefty court fees to obtain their judgment. An enforcement team within the employment tribunal administration could take responsibility for appointing High Court Enforcement Officers to enforce awards rather than leaving the burden on individual claimants, and for monitoring their progress. To improve efficacy, the Government should first of all show more interest in whether awards are being paid – collating statistics, researching reasons for non-payment, and finding ways to address. This includes tackling companies who currently seem able to hide or transfer assets at will in order to avoid payment of an employment tribunal award.

1.7 This paper explores the problems of non-payment of employment tribunal awards and the potential solutions. It sets out the experience of some CAB clients and argues that, for the benefit of the employment market as a whole, it is time for the Government to take responsibility for the enforcement of employment rights and finally address this serious, and unacceptable, flaw in the employment tribunal system.

The current situation

A 61 year old CAB client with both adult and child dependents was awarded £1,800 by an Employment Tribunal following a claim for unpaid wages against the hotel where she worked. The award had not been paid by her employer and she was seeking advice about what she could do. The bureau showed her the forms to apply for enforcement and explained the £60 upfront fee. The client was concerned at the thought of taking this step and spending money which could be wasted, as there was no certainty the award would be paid. She was understandably upset and frustrated to have gone through the tribunal process, been successful, but received nothing.

2.1 Whilst British workers enjoy a comprehensive framework of statutory employment rights, it is inevitable that disputes about those rights will sometimes arise between workers and employers. Unfortunately, there is also a small but significant minority of rogue employers who seek to gain a competitive advantage through exploitation of their workforce – a situation detrimental not only to the employees on the receiving end of this treatment, but also to those employers who fulfil their employment duties responsibly. Along with the Acas-led system of dispute conciliation, the employment tribunal system exists both to resolve the minority of disputes that cannot be resolved in the workplace, and to provide the most vulnerable workers with a mechanism for challenging deliberate mistreatment and exploitation.

2.2 However, every year, several thousand workers find themselves in the same position as the client in the example above: relieved to have succeeded in their tribunal claim against their former employer, after often months of time-consuming and stressful preparation, and subsequently devastated when the company fails to pay any of their award. For these workers, the employment tribunal system has delivered empty justice.

2.3 Employment tribunals have no power to enforce their own awards, which – until April 2010 – could be enforced only by means of complex, time-consuming and costly legal action by the claimant themselves, in the county court system. Between 2004 and 2008, Citizens Advice published three reports – *Empty justice* (2004), *Hollow victories* (2005) and *Justice denied* (2008) – which highlighted both the widespread non-payment of tribunal awards (and Acas settlements) by rogue employers, and the difficulty faced by individual workers in trying to enforce their unpaid award through the county court system. Using case studies from the advice work of Citizens Advice Bureaux, Citizens Advice demonstrated how rogue employers could easily drag out and frustrate such enforcement action, leaving the worker empty handed.

2.4 Research by the Ministry of Justice – conducted in direct response to *Justice denied*, and published in May 2009 – found that 49 per cent, or half, of all employment tribunal awards were going unpaid in the first instance (i.e. without the taking of enforcement action in the county courts).³ This disturbing finding led the then Labour government to introduce, in April 2010, the Acas & ET Fast Track enforcement scheme. Under this

³ 'Research into enforcement of employment tribunal awards in England & Wales', Research Series 9/09, Ministry of Justice - May 2009: 'While 61% of claimants had received full or part payment of their award, only 51% had achieved this without the involvement of the county courts' - Summary page ii

scheme, workers can pay a fee of £60 to have their unpaid award – or unpaid Acas settlement of their tribunal claim – enforced by one of the various firms of High Court Enforcement Officers (HCEOs).

2.5 While this is certainly an improvement, the Acas & ET Fast Track scheme has not solved the problem. Take up of the scheme, which costs £60 to access, is not high and HCEOs manage to enforce around 50 per cent of the awards and settlements referred to them. There is at present no reason to believe that the rate of non-compliance with awards has improved since 2009.

2.6 Certainly the experience of CAB clients bears out the ongoing and serious nature of this problem.⁴

A CAB client in her early 20s had her employment in a café suddenly terminated with no payment of money owed. She was successful at tribunal with an award of over £3,000. As of a year after the decision was made, she had received none of the award. When she attended the bureau, she was experiencing stress and financial difficulty as a result of the situation, at a time when she was also expecting her first baby.

A 45 year old man with dependent children resigned from his job when he discovered that his employer had not been paying his tax and national insurance even though these had been deducted from his salary. He claimed constructive dismissal at an employment tribunal, due to the loss of trust in his employer, won his case and was awarded over £12,000. His employer has not paid this award and the client has incurred debts as a result of his period of unemployment after leaving the job.

A CAB client, still unemployed when she attended the bureaux, was awarded £13,000 by an employment tribunal for race discrimination by her previous employer. Despite believing the employer has assets, she has received no payment. Enforcement officers have been unable to obtain the money and have closed the case. The client is now in receipt of ESA, and suffering from depression exacerbated by this situation.

2.7 The unfairness of the situations in which so many successful claimants to employment tribunals find themselves, with nothing to show for the time, effort and often courage, they have put into pursuing a claim, is now further exacerbated by the introduction of fees to access the tribunal. As of 29 July 2013, claimants to employment tribunals are subject to issue and hearing fees of £390 for relatively simple claims (eg unpaid wages or holiday pay) and £1,200 for all other claims.

2.8 These are substantial sums of money for anyone, let alone for low paid workers who are generally at greater risk of unfair practices. Citizens Advice is extremely concerned at the potential deterrent effect of such fees. Indications from provisional statistics are that the number of single claims to employment tribunals has dropped significantly since their

⁴ While the number of cases brought to bureaux has dropped, from around 1,000 in 2011/12 to around 850 in 2012/13, the reasons for this are likely to lie in the reduction in capacity caused by legal aid contracts coming to an end and new cases not being taken on.

introduction.⁵ Where people do manage to pay them however, there must be an even greater obligation on the system to deliver, as far as possible, a genuinely meaningful outcome. To achieve this, there must be action to improve the initial rate of compliance with awards by employers, and an effective system of enforcement when the compensation ordered by the tribunal is not forthcoming. Otherwise, employees seeking justice through the tribunal system will simply end up worse off than they were before, and the reputation of the tribunal system as a credible corrective of bad employer behaviour, in ever greater shreds.

2.9 Given the low percentage of tribunal awards paid, the impact of the new fees is of particular concern in relation to lower level claims.

A CAB client had her employment terminated following a complaint she made about her supervisor. She was told she would be paid to the date of termination, but she wanted to claim for the one week's notice contained in her contract which amounted to a little over £200. The bureau highlighted the significant disincentive of pursuing the claim given the level of fee required and the lack of certainty that this would be recovered.

2.10 Failure of an employer to pay an employee's wages or notice period of one or two weeks may seem a relatively small sum, but can be of vital importance to an individual, regardless of the principles involved. To spend £390 to recover a sum of a similar or lower amount is obviously a difficult decision to take, but if you feel strongly you have a good case, and have confidence that you will get the money you are owed together with payment of the fee from the employer following a tribunal claim, then you may decide to go ahead. If however the chances of obtaining the award and recouping the fee are not much better than 50% without expending even more money on enforcement fees, and not particularly high even then, then it is extremely unlikely you will pursue your claim. The combination of fees together with such unreliable outcomes means these low level claims are simply not viable and runs the risk of creating a charter for rogue employers to cut corners and ignore their obligations in relation to notice and holiday payments, and even wages.

2.11 In some instances, non-payment of an award is due to genuine failure of a business meaning that there are no available assets. However, all too often, directors of companies are able to avoid liability, either by hiding assets, or by deliberately closing down their company, having first transferred any assets to a new 'phoenix' company. In this way, they avoid payment of a tribunal award or settlement, and indeed potentially other debts.

A CAB client in his 60s was successful in an employment tribunal claim for discrimination. His employer was ordered to pay over £1,500 to him, but he has never received the money. The company was closed down by the owner and his customers and workers transferred to another company. The bureau adviser established that the owner had done this before and that there had in fact been newspaper articles about his business tactics.

A 60 year old CAB client was successful in a tribunal claim for unpaid wages totalling around £2,500. He worked for a security company which operated under

⁵ Ministry of Justice Ad-hoc publication: 'Employment Tribunal Receipt Statistics (Management Information): July to September 2013' – published 18 October 2013

various different names. He applied for a High Court Enforcement Officer to enforce the ruling, but they could not establish any obvious assets due to the ephemeral nature of the company and closed the case. The bureau stated that the company had 'previous' in employing people, not paying them, and avoiding any subsequent claim due to apparent lack of assets.

A CAB client on a low wage attended a bureau because of financial difficulties. Her difficulties had arisen because benefit calculations had been made to take into account the wages of her son who lived with her. However, the hairdressers where he worked did not pay him. He made a successful claim to an employment tribunal. The hairdressers went into liquidation and then started trading under a new name, and he has received none of his award.

A CAB client and his wife, both employed by the same company, were awarded nearly £10,000 by a tribunal for a combination of non payment of wages and holiday pay and unfair dismissal. Their former employer did not pay any of the award and then changed the name of the company. The couple do not have English as a first language and were struggling to deal with the situation.

2.12 All too often, individuals are left isolated and struggling to negotiate a situation which seems impossibly loaded against them. They have managed to find the strength and resource to fight for what is rightfully theirs, only to get to what they believe is the end of the process to find that they are empty handed and facing another battle with no guarantee of success, and indeed with the odds stacked against them.

2.13 If the Government is serious about a healthy employment market, which incentivises work and provides the necessary level of protection to employees, then it must show substantially more interest in ensuring that the judicial decisions reached by employment tribunals are respected and complied with.

The way forward

3.1 The Government has acknowledged that the current situation is unsatisfactory. In July 2012, during the House of Commons Committee stage of the Enterprise & Regulatory Reform Bill, the then employment relations minister, Norman Lamb MP, noted that ‘it is abhorrent for companies and employers not to pay awards that have been properly made by the tribunal’. And the Minister expressed his desire to find ways to improve the situation.⁶

Preferred option: government takes on enforcement of unpaid awards

3.2 Given the importance of a properly functioning employment market to the wider economy, Citizens Advice believes that it would be entirely appropriate for government to take responsibility for ensuring that tribunal decisions are complied with by employers. Individual claimants faced with non payment of an award can be lost in the midst of the confusion and complexity of what to do next at a time when speed is of the essence in preventing employers from hiding or transferring assets. Employers keen to avoid payment are well aware of the difficulties that individual claimants can face, but enforcement by government would present a very different picture. Aware that government would have far more knowledge, wield more power and not give up easily, more employers would, it is reasonable to assume, comply with decisions and pay awards before the costs of enforcement ratchet up. In other words, the very existence of government enforcement is likely to reduce the frequency with which enforcement is actually necessary.

3.3 Not only is there a precedent for government intervention to ensure that workers are receiving their rights with regard to enforcement of the National Minimum Wage, the Government has recently, in the Enterprise and Regulatory Reform Act 2013, introduced a power for employment tribunals to impose financial penalties on employers for breaches of workers’ rights with aggravating features. Where a tribunal makes such an award – to be paid into the Consolidated Fund – there will need to be a system to ensure it is paid. Extending this system to cover awards made by tribunals to individuals would demonstrate that the Government is serious about ensuring employers comply with the law and their responsibilities. This is doubly justified given that individuals will now be paying substantial fees to access the employment tribunal system – there can be no justification for those fees if ultimately the service charged for does not deliver results.

3.4 In terms of how government enforcement would operate, one possibility would be through HM Revenue and Customs who hold responsibility for compliance with the National Minimum Wage and collection of tax debt. Their responsibilities could be widened to cover enforcement of employment tribunal awards, with their costs included in the bill. The advantage of this would be the wider knowledge they will have of a company’s tax position which could assist in establishing viable assets. They may also be chasing the same company for tax debts, so could add the unpaid award to this recovery.

⁶ *Hansard*, House of Commons Bill Committee, Enterprise & Regulatory Reform Bill, Eighth Sitting - 3 July 2012, col. 362-8.

Second option: improve access and efficacy of current Acas and ET Fast Track scheme

3.5 Given the Government's acknowledgement that the current situation is unsatisfactory, it is of concern that there are no readily available statistics on the payment of awards made by the Employment Tribunal. Following the research published in 2009 by the Ministry of Justice which showed that half of employment tribunal awards were going unpaid in the first instance, regular monitoring of the situation should have been instituted. Figures were provided in response to a written Parliamentary Question (see Annex A) on take up and success rate of the Acas and ET Fast Track enforcement scheme, but this is not the only possible route of enforcement and we do not have figures for the number and success of claimants who attempt enforcement through the county courts. The Government has acknowledged that take up of the Fast Track scheme is low.⁷ While we would suggest the £60 fee may play some part in this, we are not aware of any research undertaken into why people are not accessing the scheme.

3.6 Consistency and clarity of information available to claimants seeking to enforce an award is important in this context. The gov.uk website provides information on the Acas and ET Fast Track scheme, and provides a link to the appropriate form. This form is also available via the justice.gov.uk website. However, on that same website, within the hearing guidance for the Employment Tribunal, under the question 'What should I do if I do not receive the award made', there is no direct reference to the Fast Track enforcement scheme (albeit that a leaflet referenced in that section does mention the scheme). It refers people instead to their local county court for enforcement, despite showing an update date of 30 September 2013.

3.7 This lack of monitoring and lack of appropriate information to claimants demonstrate, in our view, a serious lack of interest in the experience of those seeking justice through the Employment Tribunal – people who now face hefty fees in order to access that Tribunal. To take those fees for a public service, without doing everything possible to ensure that service delivers a meaningful and fair outcome, is quite simply indefensible.

3.8 Citizens Advice considers that three steps should be taken immediately to improve this situation:

- 1) abolish the £60 fee for accessing the Fast Track enforcement scheme. Having paid fees of up to £390 or £1,200 (depending on the nature of the claim) and receiving a judgment with an award in their favour, claimants should not be expected to pay more to try and enforce the decision of the tribunal
- 2) ensure that appropriate information on enforcement is made readily available to claimants and is consistent at all relevant information access points
- 3) put in place mechanisms to collate statistics on payment of employment tribunal awards and undertake further research where necessary

⁷ *Hansard* House of Commons debate 17 October 2012 col. 345, Jo Swinson commented that the Fast Track scheme has 'had some success, but not enough people have been accessing it'.

3.9 In this context, we acknowledge and welcome the fact that BIS has undertaken some further research into payment of awards following a commitment from the Employment Relations Minister, Jo Swinson⁸, and we look forward to their findings and proposals to address the current problems.

3.10 The response to a written Parliamentary Question given in June 2012 (see Annex A fig 1) showed that, of the 1,052 completed cases referred to High Court Enforcement Officers under the Fast Track scheme in its second year of operation (financial year 2011/12) the award was fully or partially enforced in 535 cases – 51%. While this represented a welcome 10% increase on the level of fully or partially enforced awards from the first year of operation (financial year 2010/11) it still means that nearly half the cases referred to the HCEOs go unenforced.

3.11 The same Parliamentary Question response set out the reasons for non-enforcement (see Annex A fig 2). The two most common reasons for 2011/12 were:

- i) that the debtor company had become insolvent, and
- ii) that the HCEOs were unable to make contact with the debtor company

3.12 In some cases, this insolvency or inability to contact the company named in the tribunal judgment will have been due to a genuine business failure, but it is widely acknowledged that in others the directors of the company will have deliberately shut the company down, after transferring all its assets to a new, so-called ‘phoenix’ company, simply to avoid payment of the award or settlement (and perhaps other debts).

3.13 This suggests that one potential reform would be to enable the HCEOs to readily enforce an award against such a new ‘phoenix’ company, or its individual company directors, rather than just the now defunct company named on the tribunal claim form and judgment. This could be achieved by a process to allow quick reapplication where a name change to a company or removal of assets has clearly been used to avoid payment.⁹ Employment judges could, in fact, be given the legal powers necessary to directly instruct the HCEOs on how, and against whom, to enforce an unpaid award or settlement.

3.14 For the individual claimant, who has already faced the uphill struggle of the tribunal itself, the whole process would be made considerably easier if responsibility for initiating enforcement activity, and monitoring its progress, lay with the tribunal itself. Citizens Advice recommends that:

- 4) an enforcement team within the employment tribunal administration is set up to take responsibility for appointing High Court Enforcement Officers to enforce awards, and monitoring their progress, rather than leaving the burden on individual claimants
- 5) steps are taken to enable enforcement of awards against ‘phoenix’ companies or their directors, where a debtor company has clearly transferred assets to avoid payment

⁸ *Hansard*, House of Commons, 17 October 2012, col. 345

⁹ While it is sometimes possible for the claimant to make an application to the employment tribunal to have the company named in the judgment changed, in the experience of Citizens Advice Bureaux this is a lengthy, challenging and time-consuming process for the claimant.

Conclusion

4.1 For far too long, individual, and often vulnerable, workers have suffered at the hands of rogue employers who are able to play the system to avoid their responsibilities. These responsibilities are not just important to the several thousand exploited workers who never receive the awards or settlements which a judicial system has determined are theirs by right, but also to society as a whole in ensuring a healthy employment market where employers can compete on a level playing field.

4.2 Citizens Advice believes that the Government must finally take action to ensure that the rights and protections it has stated should be given to workers are properly enforced. The current combination of hefty fees and precarious outcomes risk rendering the Employment Tribunal more and more ineffective as a means of ensuring that employers act responsibly.

4.3 Our preferred option would be a system of government enforcement, so that employers who currently do not fear a tribunal award made against them, realise that they will face much tougher opposition if they fail to pay upfront. Such a system would have the benefit that all information available to government for example, through tax records, can be used to assess a company's ability to pay an award.

4.4 Whether by this route, or by giving direct responsibility for enforcement to the Employment Tribunal and improving the Acas & ET Fast Track scheme, or by other means, we urge the Government to act now to ensure the protections it has determined should be there for people in employment, not to mention those it is working hard to encourage into the workplace, are more than just hollow promises.

Annex A

In the financial year 2010/11, 1,499 unpaid employment tribunal awards and Acas settlements were passed to High Court Enforcement Officers. As of 27 March 2012, in 49 cases enforcement action was ongoing, and 155 cases were being investigated further with HCEOs.

In the financial year 2011/12, 1,623 unpaid employment tribunal awards and Acas settlements were passed to High Court Enforcement Officers. As of 11 June 2012, in 553 cases enforcement action was ongoing, and 18 cases were being investigated further with HCEOs.

Fig 1: The Acas and ET Fast Track scheme: key outcomes for completed cases only

Outcome	Year 1 (2010/11)		Year 2 (2011/12)	
	Number	%	Number	%
Fully enforced	484	37	515	49
Enforced in part	49	4	30	3
Unenforceable	762	59	507	48
Total	1295	100	1052	100

Fig 2: The Acas and ET Fast Track scheme: reasons for non-enforcement

Reason for non-enforcement	Year 1 (2010/11)		Year 2 (2011/12)	
	Number	%	Number	%
Unable to make contact with debtor	111	15	173	34
Debtor insolvent	298	39	171	34
Enforcement stopped by order of court	13	2	21	4
Enforcement stopped by creditor	135	18	130	26
Writ expired	169	22	-	-
Other reasons	36	5	12	2
Total	762	101	507	100

Source: Hansard, House of Commons, 27 March, 2012, col. 1073W and 11 June, 2012, col. 349W

